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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 749

SUN OIL COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, the Sun Oil Company, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Federal Trade Commission (J.A. 66-78)[1] is reported at 55 F.T.C. 2071. The opinion of the Court of Appeals (App. *infra*, p. 1a——) is not yet reported.

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[1] "J.A." refers to the joint appendix certified by the Court of Appeals below. "C.A." refers to the separately bound "Book of Exhibits Received In Camera by the Commission", also certified by the court below. "App." refers to the appendix printed *infra*.

JURISDICTION

The judgment of the Court of Appeals (App. *infra*, p. 26a) was entered on August 19, 1965, and its Final Decree on September 14, 1965 (App. 25a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under *Simpson* v. *Union Oil Company of California*, 377 U.S. 13, and *United States* v. *Masonite Corp.*, 316 U.S. 265, the defensive employment of bona fide consignment agreements with some 24 retail gasoline dealers for the purpose of assisting the dealers to survive and become competitive in an abnormal, unstable marketing area, where the consignment agreements were neither coercively induced nor maintained, violates section 5 of the Federal Trade Commission Act.

2. Whether the Court of Appeals erred in refusing to vacate the Commission's Order because this Court's decision in *Simpson* v. *Union Oil Co. of California*, 377 U.S. 13, should, in such a case as this, be given only prospective application.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, provides in pertinent part:

> Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT

On November 8, 1957, the Federal Trade Commission (the Commission) issued a complaint (J.A. 1) against Petitioner, Sun Oil Company (Sun), charging that

Sun's use of commission consignment as the method of marketing its branded Sunoco gasoline in the Norfolk, Virginia market area, commencing on November 5, 1956, constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) (the Act). The pertinent facts may be summarized as follows:

a. *The relevant market.* The relevant market involved consists of the metropolitan areas and contiguous territory of the cities of Norfolk, Portsmouth and Virginia Beach, Virginia (the "Norfolk area") (App. 4a). The relevant period of time as alleged and found is November 1956 through April 1959. (App. 5a).

Prior to November 1956, the Norfolk area was and it continued to be, an unstable and an abnormal market. The primary cause of this condition was the presence and competitive impact of an unusually large number of military exchanges (J.A. 40, 181-182, 882-883) which marketed gasolines supplied by such major companies as Texaco, Shell and Esso at prices four to five cents below the prevailing retail prices being posted at competing major brand service stations (App. 5a). Additionally, the market included 21 "private brand" stations, which usually sold gasoline at a price below the major brand prices (App. 5a). Many of these private brand stations had better locations, facilities and services than many of the competing major brand stations, sold either identical gasoline or a product of equal quality, gave coupons and other discount premiums, and enjoyed greater gallonage per station (J.A. 50). These post exchange and private brand stations held an unusually large share of the market (J.A. 40, 948-952).

Because the area for years had been composed of a large transient and lower income population, price was a crucially important competitive factor in the market (J.A. 858, 1101-1102, 249, 377, 453, 792, 1411). Therefore, it was a volatile, unstable market, characterized by frequent and prolonged price wars (J.A. 67, 453, 535, 804, 815-816). And a price disturbance that began in one section of the area would rapidly spread throughout the entire market like a "brush fire" (J.A. 249, 378, 490, 561, 595, 719).

Sun had entered the Norfolk area in 1946, marketing its gasoline exclusively through a wholesale distributor, the Taylor Oil Company, which began operations with but one outlet (J.A. 794). Under Taylor, Sunoco dealer outlets retailed gasoline at prices equal to the lowest prices posted by the private brand dealers (J.A. 757, 799-800, 803, 67-68), and, therefore, Sunoco gasoline had the image of just another private brand. By 1953, the last complete year for which figures are available, Taylor's share of the overall market was approximately 7 percent (J.A. 41). In July of 1954, Taylor supplied 34 stations which sold a volume of 723,275 gallons per month, or an average of 21,272 gallons per station (J.A. 1520, 68). In September of 1954, however, Taylor cancelled his agreement with Sun and became a distributor for a competing supplier (J.A. 121-122, 819-820).

Thereafter, Sun acted as the distributor of its gasolines in the market. It had but 9 outlets and its very modest market share declined substantially from what it had enjoyed under Taylor (J.A. 1521, 41). Sun endeavored to develop acceptance of its gasoline as a major brand, and priced it at wholesale and in a few

company operated stations so as to match prevailing prices of major brands (J.A. 41). Sun was handicapped by the public concept, in this highly price conscious area, that Sunoco was not a major brand product, but rather that its accustomed posted price was the same as the posted price of the unbranded stations and lower than the prevailing major-brand posted prices (J.A. 68, 936, 1004).

Sun attempted to improve its representation in the market by building additional outlets, and it was supplying 29 Sunoco stations by October of 1956. (J.A. 1522). Although it was thus able to increase its overall gallonage between September of 1954 and October of 1956, both its share of the market and its total gallonage were substantially less than it had enjoyed during the years that Taylor distributed Sunoco gasoline. Thus, Sun's share of the total market was 3.85 percent in October of 1956, as compared with the 7 percent it previously had attained under Taylor (J.A. 42). In January-July, 1954, Taylor's last months of operation, Taylor distributed some 4,599,944 gallons (J.A. 1520), while Sun distributed 2,492,935 gallons during the same period in 1956 (J.A. 1522).

The average gallonage per Sun station also remained substantially less than the 21,272 average that had been attained under Taylor. In October, 1956, Sun sold 391,177 gallons through its 29 stations or an average of 13,488 gallons per station (J.A. 68, 1522).

As a result of this declining market position, a number of dealers discontinued their dealerships because they were unable to make a profit, those that were operating were economically unhealthy, it appeared that more dealers would turn back their stations, and Sun

was finding it difficult to persuade people to take over the operation of its vacant stations (J.A. 831-834, 883-884).

This was the state of affairs when, in October, 1956, another price war erupted in the upper Hampton Boulevard area of Norfolk, with 5 major stations (other than Sun) posting a price 3 cents below the previously prevailing price for major gasolines (J.A. 68). Sun's dealers and Sun's volume of sales became further jeopardized and Sun, to meet the latest competitive attack, unilaterally decided to offer all of its dealers in the market area the opportunity to operate as consignee agents with a guaranteed minimum commission per gallon. (J.A. 1455-1458).

(b) *The decision to offer commission consignment.* Sun's leading purpose in offering consignment was to assist its dealers, and itself, to continue in business and become competitive in this market. The immediate problem was the outbreak of the price war on Hampton Boulevard. It was necessary for the Company to provide help, (J.A. 894, 1457), but to have limited assistance to the dealer or dealers proximate to Hampton Boulevard would have siphoned gallonage from Sunoco dealers in other parts of this single market area, for the price war would inevitably spread fast throughout the area, as they did historically, and therefore Sun decided to extend assistance to all dealers in the market area so that no dealer would be hurt or penalized. (J.A. 1457, 165).[2]

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[2] Sun had a written policy concerning the use of commission consignment (see, *e.g.*, J.A. 1342). The December 27, 1955 policy statement makes it clear that consignment was to be used, as it in fact was here, as a means of assistance to dealers confronted with depressed price conditions. Thus, the statement notes that the

Sun considered other methods for aiding its dealers, but rejected them for business or legal reasons. Thus, assistance by reduction of the tank wagon price was rejected because it would depress the market without benefitting anyone, since the post exchanges and private brands were purchasing their gasolines at a fixed discount below the tank wagon price (J.A. 834)[3] and both the exchanges (J.A. 591, 595-596) and the private brand dealers (J.A. 535-536, C.A. 26-36) received additional discounts during price wars or to meet competition. To reduce the tank wagon price almost automatically would cause those two large segments of the market to receive their supplies at new, lower prices. Further-

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consignment method of marketing originally was conceived for use in isolated cases, to assist a dealer or a limited number of dealers operating under depressed price conditions. However, the use of the plan expanded to a point where it was installed extensively over some large areas. This resulted from: (a) long-continued depressed price situations in certain parts of Sun's marketing territory, with such conditions sometimes embracing large geographical areas; (b) the resultant continued need to assist dealers in such areas; (c) the failure of tankwagon changes or voluntary allowances to give these dealers effective assistance for any period of time, often due to unusual competitive activities and pricing practices. The statement affirmed the "[belief] that the Commission Consignment Plan under these conditions permits more immediate assistance and more effective assistance to dealers, even though it is more difficult to handle from the Company's standpoint, as to details and accounting" (J.A. 1343).

Consignment, however, was not Sun's principal method of marketing gasoline through the 8900 retail outlets referred to in the Commission's complaint (J.A. 2). Moreover, between August of 1957 and August of 1958, Sun reduced the number of dealers on consignment from 2,195 to 421 (J.A. 869).

[3] The military exchanges purchased gasoline from their suppliers at a fixed discount of 3.69 cents per gallon below the prevailing tankwagon price paid by major brand dealers (J.A. 586, 591), and the private brand dealers received a discount of about 3 cents (C.A. 5-6, J.A. 851-852).

more, the Company's general experience was that neither tank wagon changes nor voluntary price allowances provided effective assistance for dealers in a depressed area (J.A. 1342, 1495-1496). On the other hand, consignment had proved to be a more effective and immediate means of assisting dealers (J.A. 1342, 1496).[4] Finally, Sun decided against tank wagon reductions or competitive price allowances because of the fact that the Commission recently had instituted a proceeding charging that in granting that kind of assistance to a single dealer in Jacksonville, Florida, Sun had illegally discriminated in price against other Sun dealers (J.A. 834, 1496).[5]

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[4] It should be noted that assistance through tank wagon reductions, or allowances, would have been unfair to the dealers in this volatile area where price moves are frequent and therefore price assistance to dealers would have to take the form of frequent changes in tank wagon prices to meet competition. A dealer who has a full or almost full supply would suffer when a tank wagon price is lowered, while a dealer whose tanks are almost empty would fill them at a lower cost for his gasoline than the cost of the dealer with full tanks. For example, a dealer who purchased a supply of gasoline when the retail price was 27.9 cents and his cost was 23.4 cents would be in an economic and competitive predicament if the retail price thereafter fell to 25.9 cents. Retroactive price adjustments could not restore timely equality and a certainty in the minds of all dealers that they could price their gasoline competitively. Under consignment this kind of unfairness and inequality were avoided. Moreover, retroactive price adjustments would have put Sun in danger of possible charges of price discrimination.

[5] See *Sun Oil Co.* v. *Federal Trade Commission*, 371 U.S. 505. There was, of course, another alternative available to Sun, and that was to vertically integrate by operating its retail outlets in the Norfolk area. At the time that Sun decided to offer consignment to its dealers, it had about 5 company operated stations, and the "trend that seemed to be in motion at that time" was that it would have ended up with more company operated outlets (J.A. 833). Company operation was regarded by Sun as an unsatis-

On November 5, 1956 Sun offered to its dealers in the Norfolk area the opportunity to become commission merchants to sell Sun's gasoline. Sun's local manager, Southard, held a series of three meetings, attended by different groups of dealers, at which he explained the operation of consignment selling and the reasons for its offer (J.A. 164-165, 1457). The dealers were informed that they were free to reject the plan (J.A. 175-176, 285, 374, 718). As dealer Helth, a Commission witness, acknowledged (J.A. 285):

> A. Well, my busines at the time of that meeting wasn't very good. And I was contemplating going out of business. And I didn't feel that I could stay in business and operate on my own setting my own price and buying at the regular tankwagon price.
>
> And at the end of the meeting I started thinking that maybe this would be my salvation.
>
> So in accordance with everyone else I signed up.
>
> * * *
>
> Q. Well, you weren't compelled to sign this agreement, were you?
>
> A. Oh, no, it was strictly of the dealer's own volition.

All except one dealer accepted the plan (J.A. 406). The sole exception did not properly understand it and he later executed a consignment contract (J.A. 423-424).

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factory alternative, and instead it sought to make the operations of its dealers more profitable (*Ibid*). The need to survive and be competitive in unstable markets and/or during price wars eventually may outweigh the "apparently persuasive reasons for heretofore rejecting direct ownership and operation of their stations . . . ." *Sun Oil Co.* v. *Federal Trade Commission*, 371 U.S. 505, at 529-530.

(c) *The operation of consignment.* Under the consignment plan Sun and any dealer wishing to take advantage of it entered into an Amendment to the dealer's purchase agreement whereby all provisions of the agreement relating to the purchase and sale of motor fuel were suspended. Sun agreed to deliver gasoline to which it expressly retained title, and all proceeds of sale were Sun's property and were to be segregated from the Agent's other funds. The agent was required to sell at the price designated by Sun, to be responsible for the consigned stock, to keep such records as Sun might require, and to account to Sun and deliver the proceeds of sale, less commissions, at such times as Sun might require.

At the inception of the consignment plan, Sun purchased the gasoline then in the dealers' tanks, giving them credit for the value thereof. (J.A. 249-250, 491, 716, 1349, 1588). Thereafter, the agents accounted to Sun for the amount of gasoline actually sold (J.A. 246, 335, 376). Every time Sun made a change in the retail price, the amount of gasoline in each agent's tanks was measured, and the amount sold at each price was accounted for. (J.A. 261, 377, 448, 716-717). Whenever consignment was initiated at any station in any market area, Sun's Tax Department in Philadelphia was notified and it was their duty to obtain any necessary retail licenses in the name of the Company. Initially, through inadvertence, they failed to take this step in Norfolk, but when it was called to their attention by the Norfolk Commissioner of Revenue the error was promptly rectified and taxes were paid (J.A. 736-737).

The minimum commission payable to the dealers in the Norfolk market area initially was 4.5 cents per

gallon (J.A. 1457), but it was increased to 5.25 cents by January of 1957 (J.A. 212-213), and no lower commission was paid in the area after January 14, 1957 (See Commission Exhibit 93, at J.A. 1538 *ff*). At such times as the retail price approximated the price prevailing prior to consignment, the commission increased to approximately the margin the dealers previously had enjoyed (J.A. 243, 216-217). Moreover, under consignment Sun was able to be competitive and meet the lower price war prices of competing companies without penalizing its dealers. It periodically reduced the retail price of consignment gasoline in order to respond to reduced prices which previously had been posted by other major and private brand stations (J.A. 1620 *ff*.). Moreover, when it reduced its price below 24.8 cents, the amount that the dealers paid Sun for the gasoline prior to the price war, the dealer-agents nevertheless received the minimum commission of 4.5 cents and later 5.25 cents.[6]

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[6] As noted before, the dealer most proximate to the area where the price disturbance erupted earned a margin of 6.1 cents on a retail posting of 30.9 cents before the outbreak of the price war (J.A. 1455). However, if he and other Sunoco dealers had not accepted assistance from Sun through consignment and had attempted to meet the initial price war posting of 27.9 cents, the gross profit would have dropped to 3.1 cents (J.A. 893-894, 1455). Similarly, since the cost of the gasoline to the dealers (tank wagon price) was 24.8 cents (J.A. 424), they would have earned 1/10 cents per gallon when the retail price dropped to 24.9 cents on November 15, 1956 (J.A. 1539). Yet, under consignment they earned at least 4.5 cents before January 14, 1957 (J.A. 1539-1540), and at least 5.25 cents thereafter at postings of 24.9 cents and lower. On the other hand, when the retail price fell to 24.9 cents, Sun was retailing its gas at 1/10 cents above the price that it had been charging its dealers prior to the offer of consignment. Yet, from that amount Sun had to pay its dealers the minimum commission, and commission consignment administratively was a more

(d) *The decisions below.* The Commission held that Sun's use of consignment was illegal, "not because it did not constitute a genuine consignment under the law of agency", but because the proof showed it to be a vertical and horizontal price fixing device (J.A. 75) This conclusion was based on the fact that the consignment contracts were not separately and individually negotiated with each dealer. Rather, the Commission reasoned, the dealers were called together in groups, and at these meetings "the dealers among themselves and in each other's physical presence could and did pledge to fix prices horizontally; Sun, in the presence of the dealers, pledged to fix prices vertically" (J.A. 73). The Commission distinguish *United States* v. *General Electric Co.*, 272 U.S. 476, where this Court sustained the validity of a comprehensive consignment program against a charge that the agreements constituted a device for price fixing, on the ground that Sun, unlike General Electric, "did not content itself with unilateral vertical arrangements but instead joined with its dealers in horizontal arrangements which wiped out any slight opportunity for independent market action through price variances of any of its retail dealers" (J.A. 73).

The court below, in affirming, noted that the Commission had found that two price fixing conspiracies

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expensive and cumbersome method of marketing for the company (J.A. 199, 1343).

Under consignment the dealers received a commission of 5.9 cents at a retail posting of 30.9 cents after January 14, 1957, or 2/10 cents less than they did before consignment, an insignficant difference. At postings of 29.9 cents and 28.9 cents, they received a greater income under consignment, or 5.7 cents as compared to 5.1 cents, and 5.5 cents as compared to 4.1 cents (See, generally, Commission Exhibit 93, J.A. 1540 *et seq.*). Thus, consignment in fact did financially assist the dealers.

existed—a horizontal one among all the dealers accepting consignment, and a vertical one between Sun and each of the dealers accepting consignment. It is significant that the court stated that the "horizontal" conspiracy was inferred from the pattern of price fixing disclosed in the record, and it concluded that there was adequate foundation for *such* a finding by the Commission.[7] It agreed with the Commission that the instant case was distinguishable from *United States* v. *General Electric Co.*, 272 U.S. 476, on the ground that this case involved horizontal as well as vertical price control. In express reliance upon *United States* v. *Masonite Corporation*, 316 U.S. 265, and *Simpson* v. *Union Oil Co. of California*, 377 U.S. 13, the Court of Appeals held that "where a commission consignment plan such as this, otherwise valid as measured by the law of agency, and even though not coercively induced, results in horizontal as well as vertical price control, such consignment plan constitutes an illegal price fixing device and an unfair method of competition and unfair practice in violation of the Federal Trade Commission Act. Such a commission consignment plan as we have here we find to be *illegal per se*, for its evil—like the plan condemned in *Simpson*—'is its inexorable potentiality for and even certainty in destroying competition in retail sales of gasoline by . . . 'consignees' who are in reality small struggling competitors seeking retail gas customers.' 377 U.S. at 21." (Emphasis supplied). (App. 22a).

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[7] That the dealers were called in to meetings in groups does not appear to be the basis of the finding of a horizontal conspiracy.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals erred in holding that Sun's use of a non-coercive commission consignment program of the dimensions involved here constitutes an illegal price fixing device under the Federal Trade Commission Act. The valid retention of title to gasoline by Sun is unquestioned in this case. The antitrust laws do not expressly prohibit the owner of goods generally from determining the price at which they will be sold by bona fide agents. This Court in *Simpson* v. *Union Oil Co. of California,* 377 U.S. 13, has found such a prohibition under the circumstances of that case. But the court below went beyond the antitrust laws and this Court's decision in *Simpson.* Commission consignment is an ancient and widely used method of marketing, and consignment by itself is not a *per se* violation of the antitrust laws. It was error to give extension to *Simpson* and hold that Sun's non-coercive employment of consignment as a means of assisting its dealers to survive a situation of competitive necessity in a small, abnormal market area, was prohibited.

The consignment agreements involved here are distinguishable, in purpose and effect, from the consignment program held illegal in *Simpson* v. *Union Oil Co. of California,* 377 U.S. 13, one of the cases principally relied on by the court below. In *Simpson,* this Court concluded that: (1) The consignment arrangement was coercive; (2) It was Union's only method of distribution; (3) Use of consignment in marketing of gasoline, the Court stated, is for resale price maintenance; and (4) The evil of the program of Union Oil was its potentiality for and certainty in destroying

completion by the consignees, who are small, struggling, retail dealers.

Here, however, neither Court of Appeals nor the Commission concluded that Sun's program was coercively induced.[8] Moreover, the consignment program here does not embrace a vast distribution system. Sun offered consignment to the fewer than 30 dealers in the small, abnormal market area because of the competitive circumstances which existed there. Additionally, unlike Union, Sun did not adopt consignment as its exclusive method of marketing, but largely sold to dealers in its total market area for resale. Indeed, consignment was not even mandatory in the Norfolk area, and a dealer who originally accepted consignment could thereafter terminate the arrangement on five days' notice (J.A. 1186). Even when prices and commissions went up dealers did not elect to go back to the former method of purchase and resale.

Furthermore, Sun did not introduce consignment into a normal market as a device for price fixing. Rather, Sun was impelled to offer consignment defensively to meet a situation of dire competitive neces-

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[8] The court below pointed out that: "With regard to coercion, the Commission merely found that 'a combination or conspiracy was instituted even though dealers were not uniformly desirous of entering into the arrangement proposed by the respondent.' The word 'coercion' is not even present in the Commission's opinion." (App. 21a). Both the Commission and the court below took the present case to be different from *The Atlantic Refining Co.* v. *Federal Trade Commission*, 344 F.2d 599 (C.A. 6). That case is now before this Court on petition for certiorari (No. 558, October Term, 1965) and in the brief for the Federal Trade Commission In Opposition it appears to be conceded that neither the Seventh Circuit Court of Appeals nor the Commission made a finding that Sun *had* employed coercion. (p. 6n).

sity. First, its share of the market, always relatively insignificant, and its gallonage per station had declined substantially; a number of dealers had turned back their stations because they were unable to make a profit; and those that were operating were economically unhealthy (J.A. 833, 883). Second, the situation confronting the dealers became more serious with the outbreak of the price war in October 1956, which threatened a prolonged period of price instability and reduced profit margins for Sun's beleaguered dealers. To continue in business, these dealers had to meet the depressed price war prices. Sun's purpose in introducing consignment was to preserve inter-brand competition by assisting its dealers and itself through assumption of the burdens of marketing direct to the motoring public while guaranteeing the dealers at least a minimum income per gallon regardless of how low the retail prices fell.

Contrary to the view of the court below (App. 21a), this case is distinguishable from *Simpson* because the use of consignment did not have an "inexorable potentiality for and even certainty in" destroying competition by Sun dealers for retail customers. The problem that existed in this market was that Sun dealers were being destroyed by the competition of other brands. Their continued destruction would reduce intra-brand as well as inter-brand competition. Consignment, in part, was Sun's method of financially helping the dealers during the struggle to obtain and hold customers. Further, unlike Union Oil, Sun did not impose non-competitive prices on its dealers but actually engaged in effective interbrand competition after the adoption of consignment. The record (J.A. 1620 *ff.*) establishes that Sun reduced the retail prices

at its various stations in different sections of the market in order to be competitive with the lower prices as they were posted at competing outlets. For example, on June 21, 1957, the retail price of Sunoco in the Portsmouth-Sleepy Hole segment of the market was reduced from 27.9¢ to 23.9¢ because four other major companies had previously posted that price. (J.A. 1625). The dealers received the minimum commission (5.25¢ per gallon) even though the retail price of the gasoline was lower than what the gasoline cost the dealers (24.8¢) prior to the outbreak of the price war. As one Sunoco dealer put it: "Well, the way the price fluctuates and everything, the consignment plan is actually a little better. It gives me a chance to meet competition, and it is not as expensive to me as it could be otherwise." (J.A. 243)

The court below held, however, that the consignment agreements were illegal because they resulted in "horizontal as well as vertical price control" (App. 16a). The court's reliance upon *United States* v. *Masonite Corporation,* 316 U.S. 265, is misplaced. In *Masonite,* this Court was not concerned with the question of validity of consignment agreements between a supplier and its distributors, but it was presented with a horizontal conspiracy between suppliers of competing products to fix prices through the device of commission consignment. *Masonite* would be relevant if Sun had appointed a group of competing oil companies as its consignee-agents to sell Sunoco gasoline at prices fixed by Sun. The distinction between such a combination of competitors and the consignment adopted here is of great practical significance in the market place. Under the former, "whole industries could be knit together so as to regulate prices and suppress com-

petition" (316 U.S. at 278); under the latter, as the record in this case discloses, competition continues and flourishes.

Moreover, the Commission's conclusion, affirmed by the court below, that the dealers entered into "at least a tacit" (J.A. 74) horizontal agreement with respect to the fixing of retail prices, was predicated on the fact that Sun offered consignment at meetings attended by several dealers, rather than negotiating the contracts separately and individually with each dealer. Because the Sun official at those meetings advised the dealers that under consignment Sun would have the right to determine the retail price, and that it might be necessary for Sun to price its gasolines more competitively with the post exchange and private brands, the Commission ruled that the dealers entered into a horizontal conspiracy when they accepted consignment. Taking the opinion of the Court of Appeals to have adopted this thesis, the question is at once raised whether a supplier may ever offer consignment to more than one distributor in a competitive market area as a means of assistance.[9] This is a question which was not discussed in Simpson and which is of large importance. In order to make such an offer, the supplier would have to approach each distributor and discuss price with him. Thus, the sup-

[9] *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226-227, is not in point. The Court there stated that "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act". Here, however, neither the purpose, the necessary consequence, nor the actual effect of Sun's use of this broadly used method of marketing was an unreasonable restraint of trade.

plier would have to inform the distributor that under consignment it would have the right to determine the retail price of the product. The supplier would at least have to explain its intended general pricing policy. Candor also would require the supplier to explain to each distributor that the same offer and discussion with respect to price was being made to other outlets. Under the reasoning of the decisions below, the dealers accepting the offer could be found to have joined a horizontal conspiracy with respect to retail prices since, as here, they acted after a discussion as to what the retail pricing policy of the consignor would be and with knowledge that the same offer was being made to other distributors. There would, therefore, be no way for a supplier to safely offer consignment to more than one distributor in a market area, no matter what the competitive circumstances might be.

2. The questions presented by this case are of substantial and continuing importance. As this Court recognized, "Consignments perform an important function in trade and commerce, and their integrity has been recognized by many courts, including this one, *Simpson* v. *Union Oil Co. of California,* 377 U.S. 13, 17. Moreover, consignment is extensively employed throughout the economy on both the retail and wholesale levels. See *Simpson* v. *Union Oil Co. of California,* 377 U.S. at 30 (dissenting opinion); Handler, *Recent Antitrust Developments,* 63 Mich. L. Rev. 59, 61-62 (1964). The question whether this time-honored method of marketing violates the Sherman or Federal Trade Commission Act, therefore, is of wide interest and importance.

At least since this Court's decision in *United States* v. *General Electric Co.,* 272 U.S. 476, it has been be-

lieved that genuine consignment agreements do not constitute devices for price fixing within the meaning of the antitrust laws, "however comprehensive as a mass or whole in their effect" 272 U.S. at 488. In *Simpson,* however, this Court ruled that consignment could not be coercively imposed to cover a vast distribution system if used as a device for price fixing. As a result of that decision, there is a substantial question as to when and how consignment may be used in other circumstances. This case provides an appropriate record for clarifying the reach of *Simpson* and the conditions under which the consignment method of distribution may be used. For, the instant case differs in every material respect from *Simpson,* as noted above. Whether consignment which is not coercively induced can be used as a means of assistance for distributors, as it was here, is a question of recurring importance. *Cf. Snap-on-Tools* v. *Federal Trade Commission,* 321 F. 2d 825, 829 (C.A. 7) (consignment used during the initial stages of a dealer's franchise by way of financial assistance); *United States* v. *Arnold Schwinn & Co.,* 1964 CCH Trade Cases Para. 71,329 (N.D. Ill.) (distributors needed help in carrying adequate stocks of the consigned products); *C.B.S. Business Equipment Corp.* v. *Underwood Corp.,* 1964 CCH Trade Cases Para. 71,341 (S.D.N.Y.), 144 U.S.P.Q. 302;[10] *The Atlantic Refining*

[10] As was the case with the court below, the court in *Underwood* was unwilling to believe that *Simpson* constitutes a holding that consignment is *per se* illegal. It preferred to let *Simpson* stand on its own facts and reserved decision on any other consignment agreement until all pertinent facts are established. The court stated that there are persuasive reasons to justify consignment distribution, as to which it made no finding, but calling attention to estimates that the average dealer needed assistance.

Co. v. *Federal Trade Commission*, 344 F. 2d 599 (C.A. 6) certiorari pending in this Court (legality of commission consignment distribution of gasoline); *Lyons* v. *Westinghouse Electric Corp.*, 235 F. Supp. 526 (S.D.N.Y. 1964); *Guidry* v. *Continental Oil Co.*, No. 21543, 5th Cir., July 2, 1965. 1965 CCH Trade Cas. Para. 71,495.

3. The questions presented by this case are of special importance to the structure of the retail gasoline industry. Consignment was offered here to assist dealers during a situation of competitive necessity. Other methods of aiding the dealers were rejected either because they were not regarded as effective or because they involved a serious danger of a price discrimination action. See *supra*, pp. 7, 8. If the use of consignment as a means of dealer assistance also is under all circumstances unavailable to an oil company, then there will be no practical lawful means of assisting dealers experiencing severe financial difficulties in a large number of markets, and the suppliers must then undertake to vertically integrate and company-operate their retail outlets. Consignment was offered here to halt "the trend that seemed to be in motion at the time"—company operation (J.A. 833). Because that course of action now confronts this industry, we submit that it is important for the Court to resolve the question whether consignment may be used without coercion and as a defensive means of assisting a limited number of dealers during a situation of competitive necessity.

4. The petitioner structured its agency system upon the well established authority of this Court's decision in *United States* v. *General Electric Co.*, 272 U.S. 476

(1926). This it was entitled to do and to rely upon that decision as justifying the use of veritable consignment. In the court below petitioner argued, with out effect, that within the rationale of this Court's action in giving only prospective effect to its decision in *Simpson,* a cease and desist order would be inappropriate if the court below should apply the *Simpson* decision to this case. (Reply Br. p. 5).

Basic considerations of fairness and equity make it appropriate for this Court to review the result here of retrospective application of *Simpson.* The cease and desist order, while prospective, nevertheless works a punishment for past conduct, conduct here taken in good faith, through an order much broader in terms than consignment, and which runs in perpetuity.[11]

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[11] Questions of fairness and equity arise from the provisions of the order directing petitioner to cease and desist from:

1. Entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, arrangement, agreement, contract or conspiracy with any person or persons not parties hereto, to establish, fix, adopt, maintain, adhere to, or stabilize by any means or method, prices, terms or conditions of sale at which its gasoline is to be sold.

2. Establishing, maintaining, continuing, cooperating in, or carrying out, or attempting so to do, any plan, policy, program, or any consignment policy in combination with any other person or persons not parties hereto, for the purpose or with the effect of enabling respondent to establish or fix the prices, terms or conditions of sale at which its gasoline is to be resold by a dealer after purchase from respondent.

Provided, However, that nothing herein contained shall be construed to limit or otherwise affect any resale price maintenance contracts which respondent may enter into in conformity with Section 5 of the Federal Trade Commission Act, as amended by the McGuire Act (Public Law 542, 82nd Cong., 2nd Session, approved July 14, 1952).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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November, 1965

APPENDIX

Opinion of the Seventh Circuit Court of Appeals in Sun Oil Co. v. Federal Trade Commission

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1964—APRIL SESSION, 1965

Petition for Review of Order of Federal Trade Commission

No. 14503

SUN OIL COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

August 19, 1965

Before SCHNACKENBERG and KILEY, *Circuit Judges,* and GRANT, *District Judge.*

GRANT, *District Judge.* On November 8, 1957, the Federal Trade Commission (Commission) issued its complaint against the Sun Oil Company (respondent or Sun), a corporation, charging it with unfair methods of competition and unfair acts and practices in violation of § 5 of the Federal Trade Commission Act (Act), 38 Stat. 719, as amended, 15 U.S.C. § 45 (1964 ed.).[1] Thereafter, on April

[1] Section 5 provides in pertinent part:

(a)(1) Unfair methods of competition in commerce, and unfair . . . acts or practices in commerce, are declared unlawful.

• • • •

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair . . . acts or practices in commerce.

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been

7, 1959, the Commission granted the motion of counsel supporting the complaint to amend same by adding a second count charging an additional violation of § 5 of the Act. As amended, Count I of the complaint alleged that an agency consignment agreement between Sun and its dealers was a fiction and subterfuge, and in fact was an agreement or combination to fix the resale prices of gasoline. Count II alleged that, assuming such consignment agreement created a valid agency, Sun engaged in a predatory pricing practice for the purpose of destroying competition or competitors, with the effect of unduly restraining and lessening competition. The hearing examiner, on May 17, 1962, entered an order directing Sun to cease and desist from such practices as alleged and complained of in Count I. He further ordered the charges under Count II of the amended complaint dismissed, from which action no appeal

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or is using any unfair method of competition or unfair . . . act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. . . . If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by [this Act], it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. . . . After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require. . . .

was taken. Upon Sun's appeal, the Commission modified the initial decision to conform to the views expressed by the Commission and, as so modified, adopted that decision.[2] The Commission concluded:

> Under these circumstances we hold that respondent's consignment plan was unlawful not because it did not constitute a genuine consignment under the law of agency, but because the proof showed it to be a vertical and horizontal price fixing device in violation of the Federal Trade Commission Act.[3]

Accordingly, the Commission entered its final cease and desist order on November 22, 1963.[4] The case is now be-

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[2] The examiner's proposed order would have applied to all products sold by Sun. Upon Sun's challenge to the scope of the order, the Commission limited it to gasoline. Also at the request of Sun, the Commission modified the order to except contracts entered into in conformity with the McGuire Act amendment of Section 5 of the Federal Trade Commission Act, 66 Stat. 632, 15 U.S.C. § 45(a)(2)-(5).

[3] Sun's appeal was heard by a full complement of the Commission. Commissioner Anderson concurred in the result, believing that the opinion of the Commission should have given assurance that it was not attacking the general practice of consignment selling.

[4] Sun was ordered to cease and desist from:

> 1. Entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, arrangement, agreement, contract or conspiracy with any person or persons not parties hereto, to establish, fix, adopt, maintain, adhere to, or stabilize by any means or method, prices, terms or conditions of sale at which its gasoline is to be sold.
>
> 2. Establishing, maintaining, continuing, cooperating in, or carrying out, or attempting so to do, any plan, policy, program, or any consignment policy in combination with any other person or persons not parties hereto, for the purpose or with the effect of enabling respondent to establish or fix

fore this Court upon Sun's petition to review the Commission's order, pursuant to § 5(c) of the Act, 52 Stat. 113, 15 U.S.C. § 45(c) (1964 ed.) For reasons hereinafter set forth, we agree with the Commission and we affirm.

The facts in this case are not in substantial dispute. Respondent, Sun Oil Company, is a New Jersey corporation with its principal office and place of business located in Philadelphia, Pennsylvania. Respondent operates an integrated petroleum company engaged in the production, purchase and sale of crude oil, the refining of crude oil and its derivatives, and the sale and distribution of gasoline and other petroleum products in various states[5] of the United States and foreign countries. It is one of the nation's leading producers and marketers of gasoline and enjoys wide public acceptance. Sun has refineries in Pennsylvania and Ohio and markets its products through wholesale distributors, company owned and operated stations and independent dealer stations. It distributes gasoline under the brand name "Blue Sunoco" through approximately 8,900 outlets in the United States and Canada, and its 1956 gross petroleum sales exceeded $731,000,000.

The market area involved in this proceeding is comprised of the metropolitan areas and surrounding contiguous territory of the cities of Norfolk, Portsmouth and

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the prices, terms or conditions of sale at which its gasoline is to be resold by a dealer after purchase from respondent.

Provided, However, that nothing herein contained shall be construed to limit or otherwise affect any resale price maintenance contracts which respondent may enter into in conformity with Section 5 of the Federal Trade Commission Act, as amended by the McGuire Act (Public Law 542, 82nd Cong., 2nd Session, approved July 14, 1952).

[5] The states are in the general area east of Chicago. They include the New England and Middle Atlantic States, and Ohio, Michigan, Illinois, Indiana, Florida and West Virginia. Sun markets only to a minor degree in South Carolina and Georgia.

Virginia Beach, Virginia (sometimes referred to hereafter as the Norfolk area). The period covered by the complaint is November, 1956, through April, 1959.

Present in the relative market area were several military exchanges selling major-brand gasoline at prices substantially below those prevailing elsewhere in the Norfolk area. In 1956 there were 12 such Navy exchange stations plus several other PX stations. They normally posted prices which were from four to five cents below the prevailing prices of major brands for regular gasoline. However, only authorized military personnel and their dependents could purchase at such exchange stations. With what the hearing examiner aptly described as a "universe" of approximately 100 million gallons of gasoline a year in the Norfolk area, the Navy exchanges accounted for approximately 8 million gallons thereof during the relevant time period.

In addition to the Naval exchanges, in 1956 there were 21 private-brand stations in the area. They normally and customarily posted a price for regular gasoline two cents below the prevailing price at the stations of the major oil companies. During the period in question, the private-brand stations accounted for about 9 million gallons of the same universe.

As the hearing examiner found, the Norfolk area was an unstable market in which depressed prices occurred spasmodically. There were occasional price wars, and a price disturbance in one section, in time, usually would spread throughout the entire area.

Sun entered the gasoline market in the Norfolk area in 1946, marketing its gasoline exclusively through a wholesale distributor, Taylor Oil Company. Taylor sold Sun gasoline at prices equal to the lowest posted by the private-brand operators. As a result, the purchasing public did not think of Sun's gasoline as a major brand, and was

accustomed to purchasing it at the same price level as the private brands.

In September, 1954, Sun took over the operation from Taylor. At that time Sun began to open its own stations, leased to independent dealers, and unlike its operation under Taylor, operated as a major, with its dealers and company-operated stations generally posting the prices prevailing at the stations of the other major oil companies. At the time Sun took over from Taylor, its sales of gasoline products constituted about 6 percent of the overall market.[6] Sun commenced operations with fewer stations[7] and sold at the same prices as majors. This resulted in a smaller share of the market as well as less gallonage per station than Taylor enjoyed.[8]

After taking over from Taylor and prior to November 5, 1956, Sun sold its gasoline to retail dealers, who were independent contractors operating filling stations. Sun and such independent dealers entered into contracts providing for the sale of gasoline and other petroleum products by Sun to the dealers, and also entered into leases of the stations from Sun to the dealers. The agreements required the purchase of specified minimum amounts of gasoline. The leases contained a specified base monthly rental plus an additional rent of one-half cent per gallon sold. The computation of the specified base rental was based upon Sun's estimate of the potential gallonage the station might

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[6] Taylor's share of the market was approximately 7.4% in 1951, 6.5% in 1952, 7.0% in 1953, and 6.0% in September, 1954.

[7] Taylor had 34 stations in July, 1954. In early 1955 Sun had 12-14 stations, but gradually increased the number to 29 by October, 1956.

[8] In July, 1954, Taylor's 34 stations were averaging 21,272 gallons per month per station. In early 1955 Sun averaged 20,000 per month per station. However, as it increased the number of stations, the gallonage per station decreased.

In 1955, Sun accounted for only about 2.65% of the market. It advanced to 3.85% by 1956.

be expected to sell. Such estimates (and hence such base rental figures) were in all instances substantially in excess of the actual gallonage achieved. At nearly every station the actual gallonage sold was approximately one-half of the estimated potential. As a result, the stated base rental in each lease was substantially in excess of what it would have been, computed on the basis of the actual gallonage, and substantially in excess of what a dealer could afford to pay.

The leases were for year-to-year periods. At the time of the execution of the original lease, and every three months thereafter, an amendment to the lease was executed, reducing the base rent to a figure in most cases slightly less than half of the base rent set forth in the lease. In the event that such a quarterly amendment to the lease was not entered into, the rent set forth in the original lease immediately became effective. As was found by the hearing examiner, this situation gave Sun a potential power of coercion over its dealers because, if a quarterly amendment was not executed, the rental immediately more than doubled, which would probably force the dealer out of business. This could occur if the dealer declined to execute such a quarterly amendment to the lease, or if Sun chose not to execute such an amendment for any reason, including lack of cooperation.[9]

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[9] Such contractual arrangements have been noted here to illustrate the nature of the pre-existing relationships between Sun and its dealers. This relationship, in great part, led the hearing examiner to note that the bargaining between Sun and the dealers concerning consignment was conducted hardly as equals. However, the record in this case gives no indication, and the Commission did not find, that Sun ever used or explicitly threatened to use, with regard to its consignment agreements, its inherent power over Sun dealers through the quarterly amendments to the basic lease rentals and the contractual requirement to purchase a specified minimum amount of gasoline. For an important case involving this form of coercion, which is discussed below at some length, see *Simpson* v. *Union Oil Company of California*, 377 U.S. 13 (1964).

During late October and early November, 1956, a localized price disturbance occurred in Norfolk on upper Hampton Boulevard in a few blocks' stretch near the seven military exchange stations clustered in that area at the Naval Base. Several major stations, namely, Cities Service, Esso, Pure, Shell and Texaco, posted prices three cents under the major price generally prevailing in the Norfolk area. There was one Sun station located in the same general neighborhood.[10]

On November 5, 1956, as a result of this price disturbance, Mr. Southard, Norfolk District Manager of Sun, called all of the Sun dealers to a meeting at his office. Southard explained the details of Sun's commission consignment plan to the dealers, pointing out to them the

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[10] Except for the price disturbance on upper Hampton Boulevard, the prevailing major price in the Norfolk area was 30.9 cents, the prices at the military exchanges were 25.9 cents in Norfolk and 26.9 cents in Portsmouth, and the prevailing private-brand price was 28.9 cents. Although the price disturbance was limited to upper Hampton Boulevard, and had little if any effect on any of the Sun stations other than the one in that neighborhood, the nearest being approximately three miles away while the Sun stations in Virginia Beach were over 20 miles away, Sun advised the dealers that it intended to adopt the consignment plan throughout the entire Norfolk area and reduce the price to 27.9 cents, that posted by the other majors on upper Hampton Boulevard.

The hearing examiner found that Sun's area-wide reduction necessarily had the effect of spreading the price war throughout the entire area. Within a few days of the Sun reduction, the other major dealers met Sun's price and the private-brand operators reduced their prevailing price to 25.9 cents, attempting to restore the 2-cent differential. Prices continued to decline for several months. Each time that Sun and the other majors reduced their prices, the private brands in general posted a price two cents lower. However, in the latter part of March, 1957, the private brands apparently gave up the fight and posted one cent below Sun's prevailing prices. Shortly thereafter, in April, the prices at most Sun stations returned to the pre-price-war level of 30.9, and the private brands posted a price of 29.9.

situation on Hampton Boulevard, the declining gallonage per station, the fact that Sun had not achieved a share of the market comparable to that enjoyed under Taylor, the need to be more competitive in price with the military exchanges and the private-brand stations. He also indicated the probable necessity in the near future of Sun's posting a price within one cent of the prevailing private-brand price and an intention of maintaining such a differential no matter how low the private brands might reduce their prices.

Southard explained to the dealers that under the consignment plan they would be company agents for the sale of gasoline only, the company would retain title to the gasoline, establish the prices to be posted, and pay the dealers a minimum commission of 4.5 cents per gallon.[11] This was 1.6 cents less than the 6.1 cent margin the dealers were then receiving. Thus, Sun gaves its dealers the alter-

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[11] The proposed consignment agreement constituted a written amendment to the sales agreement. By its terms it purported to retain title to the gasoline in Sun, provided for deliveries of gasoline to the dealer upon consignment as an agent, Sun fixed the prices at which the gasoline was to be sold, and until August of 1957 the amendment contained a specified minimum commission after which time the minimum commission fee was to be set at the discretion of Sun. Sun purchased the gasoline already in the dealers' tanks. The gasoline in the tanks was measured each time the posted price was changed by Sun, and the dealers were required to account for that sold at the previous price.

Under this arrangement, the dealer was to act as a commission agent in the sale of gasoline although he remained an independent dealer in the sale of all other products and services. The dealers were required to segregate the funds from the sale of gasoline, but in fact never did so. All risk of loss or shortage was on the dealer. Collateral deposit agreements which the dealers previously had entered into as independent contractors to secure the payment of certain indebtedness were amended also to secure Sun for the payment of the consigned gasoline. The consignment agreements were terminable on five days' notice except for defaults which made them terminable upon 24 hours' notice.

native of accepting commission consignment or continuing to purchase gasoline at the established tankwagon price (the posted price to dealers and commercial users) and posting whatever retail price they saw fit as independent dealers. But because Sun intended to reduce the posted price at its own stations and those which went on consignment to 27.9 cents, and the tankwagon price was 24.8 cents and was to remain unchanged, the dealers who rejected consignment and continued to post a price of 30.9 cents would be unable to achieve sufficient gallonage to survive, while those who met the price of 27.9 cents would realize a margin of only 3.1 cents per gallon, less than the 4.5 cent minimum commission offered by Sun. In other words, a Sun dealer not participating in the commission consignment arrangement not only would have to compete with the lower prices of other brands of gasoline, but also would be faced with the lower prices of Sun dealers on consignment. As Southard testified before the hearing examiner, a dealer who refused consignment might be required to sell at a loss to meet the prices of Sun's consignees.

All of the dealers in the Norfolk area, save one, accepted commission consignment on November 5, 1956. Mr. Williams, who owned his own station in Portsmouth, held out for nearly three months during which time he was required to pay the tankwagon price of 24.8 cents per gallon. Sun and the other major competitors in his neighborhood reduced the posted prices to 24.9 cents, at which price he would have netted one-tenth of a cent per gallon. Williams posted 29.9 cents, and necessarily sold little gas. On February 1, 1957, he too accepted commission consignment.[12]

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[12] Inasmuch as Williams was the only hold-out from Sun's offer of commission consignment, his experience and testimony was considered peculiarly important with regard to the question of the voluntariness of the dealers' acceptance of the plan. Actually, however, the testimony of Williams at the hearing shed little light

It does not appear that respondent, Sun Oil Company, disputes this factual background. But it certainly does dispute the principal conclusions drawn therefrom. Sun has consistently contended that its commission consignment plan was a traditionally legitimate, bona fide marketing method, freely contracted, and designed to assist dealers and itself achieve better competitive status in a limited but unstable market area.

The Commission's chief conclusion was stated as follows:

> . . . (I)t is clear that on or about November 5, 1956, respondent and various or all of its dealers met and discussed arrangements for fixing and maintaining retail gasoline prices in the Norfolk area, and that a combination or conspiracy was organized to take action with respect to maintaining such prices. . . .
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> Thus respondent's consignment contracts were not separately and individually negotiated with each of its dealers. Rather the dealers were called together in groups. Sun then acted as a necessary conduit and clearing house through which the dealers among themselves and in each other's physical presence could and did pledge to fix prices horizontally; Sun, in the presence of the dealers, pledged to fix prices vertically.

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on this issue. At one point he stated that he did not initially go on consignment because of a misunderstanding of certain details of the plan. Williams owned his own station and apparently was under the impression that, if he accepted consignment, his property would be subject to certain "holds or attachment(s)" by Sun. When finally informed that this impression was incorrect, he went on consignment. On the other hand, when asked whether he felt he had any choice when he eventually went on consignment in February, 1957, Williams stated he did not. Later he testified that he felt the owner of a business had the "privilege of putting the price", and then added that "when you put a price you certainly have to be in competition and if you can't beat them you have to join them."

> The dealers attending and participating in the meetings, at least tacitly, agreed among themselves and with respondent to the taking of specific action on the maintaining of retail prices in the market. . . . (T)here is no doubt that Sun and its dealers wished and agreed to hold steadfastly to a uniform price line. . . . Sun . . . did not content itself with unilateral vertical arrangements but instead joined its dealers in horizontal arrangements which wiped out any slight opportunity for independent market action through price variances of any of its retail dealers. . . .
>
> . . . The consignment arrangement was a fiction and a subterfuge in that it was simply a device by which the unlawful price fixing arrangement was to be implemented.

The Commission finally concluded that respondent's consignment plan was "a vertical and horizontal price fixing device" which constituted "an unfair method of competition and unfair practice in violation of the Federal Trade Commission Act." We agree and we affirm.

We start, of course, from the premise that so far as the Sherman Act and the Federal Trade Commission Act are concerned,[18] a price-fixing combination is illegal per se.

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[18] The courts have construed the Federal Trade Commission Act as being *in pari materia* with the Sherman and Clayton Acts, *Menzies* v. *Federal Trade Commission*, 242 F. 2d 81 (4th Cir. 1957), cert. den. 353 U.S. 957 (1957), and have allowed the use of cases decided under any of the antitrust laws in dealing with cases brought by the Commission. *Federal Trade Commission* v. *Beech-Nut Packing*, 257 U.S. 441, 453 (1922); *Federal Trade Commission* v. *Motion Picture Adv. Service Co.*, 344 U.S. 392, 394-395 (1953). Thus it is that violations of the Sherman Act have been held to constitute violations of Section 5 of the Federal Trade Commission Act. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 690 (1948); *National Macaroni Manufacturers Association* v. *Federal Trade Commission*, 345 F. 2d 421, 427 (7th Cir. 1965).

United States v. *Paramount Pictures, Inc.*, 334 U.S. 131, 143 (1948); *United States* v. *McKesson & Robbins*, 351 U.S. 305, 308 (1956); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-223 (1940); *National Macaroni Manufacturers Association* v. *Federal Trade Commission*, 345 F.2d 421 (7th Cir. 1965). As such, the illegality of price fixing does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. Nor does it make any difference "whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices." *United States* v. *McKesson & Robbins*, supra at 309-310. It is also not important "that the prices . . . were not fixed in the sense that they were uniform and inflexible," nor is the machinery employed by a combination for price fixing material. *United States* v. *Socony-Vacuum Oil Co.*, supra at 222-223.

As already noted, the Commission found that two price fixing conspiracies existed—a horizontal one among all the dealers accepting consignment, and a vertical one between Sun and each of the dealers accepting consignment. The former was inferred from the pattern of price fixing disclosed in the record. We think there was adequate foundation for such a finding by the Commission. It is well-settled that findings of fact by the Commission, including whether a price fixing agreement was made and performed, if supported by substantial evidence, are conclusive. *National Macaroni Manufacturers Association* v. *Federal Trade Commission*, supra at 426; *National Lead Company* v. *Federal Trade Commission*, 227 F.2d 825, 832-833 (7th Cir. 1955), rev'd on other grounds, 352 U.S. 419 (1957); *Fort Howard Paper Co.* v. *Federal Trade Commission*, 156 F.2d 899, 906-907 (7th Cir. 1946), cert. den. 329 U.S. 795 (1946); *Phelps Dodge Refining Corp.* v. *Federal Trade*

Commission, 139 F.2d 393, 395 (2d Cir. 1943). The weight to be given to the facts and circumstances, as well as the inferences reasonably to be drawn therefrom, is for the Commission. *National Macaroni Manufacturers Association* v. *Federal Trade Commission,* supra at 426; *Federal Trade Commission* v. *Pacific Paper Association,* 273 U.S. 52, 63 (1927); *Independent Grocers A.D. Co.* v. *Federal Trade Commission,* 203 F.2d 941, 945 (7th Cir. 1953). A price fixing agreement and the existence of a price fixing conspiracy may be inferred or implied from the acts and conduct of the parties, as well as from the surrounding circumstances. *National Macaroni Manufacturers Association* v. *Federal Trade Commission,* supra at 426-427; *National Lead Company* v. *Federal Trade Commission,* supra at 832-833; *Triangle Conduit & Cable Co.* v. *Federal Trade Commission,* 168 F.2d 175, 179-180 (7th Cir. 1948), aff'd subnom. *Clayton Mark & Co.* v. *Federal Trade Commission,* 336 U.S. 956 (1949); *Goodman* v. *Federal Trade Commission,* 244 F.2d 584, 602 (9th Cir. 1957); *Allied Paper Mills* v. *Federal Trade Commission,* 168 F.2d 600, 606 (7th Cir. 1948), cert. den. 336 U.S. 918 (1949).[14]

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[14] The evidence taken by the hearing examiner was that, at the meetings of November 5, 1956, and after the consignment plan had been explained and offered to the dealers by Southard, there was a general discussion among the dealers themselves as to the pros and cons of the proposition. Conversations among the dealers took place both in and out of Southard's presence. Of particular import to the dealers was whether they should stay within one cent of the independents—also discussed at this time—for it was clear, as the Commission found, that the extent to which such a uniform reduction was to be maintained, "cooperation and participation by all was necessary." At the conclusion of the discussions, all dealers present signed consignment agreements. On the afternoon of the day the contracts were signed, Sun prices (with three exceptions) were dropped three cents to 27.9 cents per gallon, the proffered price. Thus supported was the finding of the Commission that "there was an interdependence in the dealers' decisions to participate in respondent's consignment plan" amounting to a horizontal price fixing device in violation of the Federal Trade Commission Act.

On the other hand, the vertical conspiracy—that between Sun and each of the dealers accepting consignment—was evidenced by express written agreements and was plainly established. In fact, Sun readily admits that the commission consignment contracts included a provision whereby Sun was to fix prices and, moreover, acknowledges that it did so while the consignment plan was in effect. Sun defends this method of vertical price fixing by reference to the traditional notion of the nature of consignment selling and by noting that the antitrust laws condemn only the fixing of prices on articles of commerce to be *resold* by another and leave the real seller or owner of the goods, in whom title rests immediately prior to sale, entirely free to fix any price he might see fit.

Sun's argument in this respect is as follows: In the judicial development of Sections 1 and 2 of the Sherman Act, the general rule evolved that vertical arrangements for retail price fixing[15] are illegal. But to this general rule, the Supreme Court recognized at least one significant exception, namely, that while vertical arrangements whereby goods sold to dealers can be resold only at prices fixed by the manufacturer-seller are considered illegal restraints of trade, sellers who *consign* their products to *agents* are free to set the price at which their products may be sold. The leading case on the validity of the consignment device in retail price maintenance is *United States* v. *General Electric Company,* 272 U.S. 476 (1926), wherein the General Electric Company attempted to fix the retail price of incandescent lamps, upon which it held an exclusive

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[15] The terms "vertical price fixing" and "resale price maintenance" are often used interchangeably. Resale price maintenance has been defined as " 'pricing through agreements or conspiracies between two or more persons operating at different levels of the same production-distribution-consumption process.' " Kronstein, Modern American Antitrust Law 145 n. 1 (1958), quoting from Kronstein & Miller, Regulation of Trade 850 (1953). The terms are used interchangeably in the course of this opinion.

patent, by converting all its dealer outlets into its own agents and requiring dealer inventory to be placed on consignment. There the Supreme Court unanimously held that "genuine contracts of agency . . . , however comprehensive as a mass or whole in their effect," did not violate the Sherman Act, because the Act did not prohibit the "owner of an article, patented or otherwise," from disposing of it "directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer."[16] *Id.* at 488. Sun further contends that the Supreme Court, in the later case of *Standard Oil Company* v. *United States,* 337 U.S. 293, 310 (1949), suggested that a marketer of gasoline could employ agency relationships with its dealers as a method of selling in a market area. There being no "resale" by the consignee, Sun concludes, this form of marketing is immune from the rule against vertical price control, and to rule to the contrary would be to impinge upon the integrity of the "ancient, lawful, broadly-used business practice" of consignment selling.

The Commission, however, in support of its order, distinguished *General Electric* from the instant case on the ground that this price fixing was horizontal as well as vertical. We think this distinction was well-taken. In *United States* v. *Masonite Corporation,* 316 U.S. 265 (1942), the Supreme Court held invalid the use of an

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[16] Inasmuch as the *General Electric* case was concerned solely with a patented product, the language "patented or otherwise" is clearly dictum. However, because of such dicta in *General Electric,* it has been thought by many that the consignment device for resale price maintenance was not inconsistent with the antitrust laws no matter how large the system involved and regardless of the non-existence of a patented product. Thus it is that "resale price maintenance of gasoline through the 'consignment' device is increasing." *Simpson* v. *Union Oil Company of California,* 377 U.S. 13, 19 (1964), citing H.R. Rep. No. 1157, 85th Cong., 1st Sess., pp. 6-7.

agency to effect horizontal price maintenance in the distribution of patented products. Masonite, the holder of a patent on hardboard, entered into agency agreements with competitors[17] under which they were made del credere agents, the product was shipped on consignment, title remained in Masonite, and Masonite established the prices at which the product was to be sold. The existence of a valid agency[18] did not deter the Court from finding an

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[17] The fact that *Masonite* involved competitors rather than vertical customers, as was the case here, is not a factor upon which that case can be distinguished. The Supreme Court has stated clearly that the elimination of competition among retail distributor purchasers by price-fixing is illegal per se, just as is such price fixing among competitors. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944). The rule is applicable here where Sun retail dealers were, to greater or lesser degree, in competition with each other. Cf., *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951).

[18] In holding Sun's consignment plan unlawful, the Commission did not find that "it did not constitute a genuine consignment under the law of agency." Supra, text at note 3. Yet there were aspects of the relationship between Sun and its dealers after consignment was put into effect that did not conform to the purported agency. For example, a portion of the rental paid to Sun by dealers who leased station premises was for the storage of gasoline on said premises. This portion of the lease agreements was never amended, even though after consignment title to the gasoline did not pass to the dealers. Thus, after consignment, the dealers continued to pay rent for the storage of gasoline, gasoline which was not theirs. Secondly, the dealers continued to hold themselves out as "proprietors", not as agents of Sun, after going on consignment, again in accordance with the unamended pre-consignment lease agreements. And finally, under local law the dealers were required to pay a retail merchants' license to sell gasoline. After the adoption of commission consignment, they continued to pay this license or tax until 1958, when Sun began to pay it after the tax officials called it to Sun's attention. Sun now contends this was the result of mere oversight. However, Sun did not go so far as to refund the license payments theretofore made by the dealers.

antitrust violation: "We assume . . . that the agreements constituted the appellees as del credere agents of Masonite. But that circumstance does not prevent the arrangement from running afoul of the Sherman Act." *Id.* at 277.

In striking down the horizontal conspiracy in *Masonite* for the fixing of prices, the Court was unmoved by the fact that each participant, other than Masonite, in negotiating and entering into the first agreements acted independently of the others, negotiated only with Masonite, desired agreement regardless of the action that might be taken by any of the others, did not require as a condition of its acceptance that Masonite make such an agreement with any of the others, and had no discussion with any of the others. Stating that "prices are fixed when they are agreed upon," *Id.* at 276, the Court went on to say (quoting *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 226-227 (1939)):

> It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. . . . It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. *Id.* at 275.

While we have followed the Commission in holding the decision in the *General Electric* case distinguishable from that now before us on the basis that we are here concerned with horizontal as well as vertical price control, additional support for this position—not then available to the Commission—is now available to us by virtue of the recent

decision in *Simpson* v. *Union Oil Company of California*, 377 U.S. 13 (1964).[19] In *Simpson*, the Court apparently for the first time, sustained a direct attack on the "exception" to per se illegality of vertical price control theretofore thought to have been carved out by *General Electric*. Rather than overruling *General Electric* expressly, however, Mr. Justice Douglas, speaking for a majority of five, chose to limit it to its special facts, emphasizing that the consignment considered in that case covered a patented product.[20] Thus limited, it is now undoubtedly the law

[19] The essential facts in *Simpson* are as follows. In conjunction with renewable one-year leases on its retail outlets, Union Oil entered into consignment agreements with its lessee dealers, under which it controlled the retail price and retained title to and paid all property taxes on the consigned gasoline until it was sold. The dealer, on the other hand, received a guaranteed commission from Union, was obliged to carry personal liability and property damage insurance, was responsible for any ordinary losses of consigned gasoline, and paid his own costs of operation. Two months before his lease expired, Simpson, Union's dealer-lessee, lowered his price on regular gasoline two cents below Union's authorized price. Union then refused to renew the lease and the agreement expired, Union resuming possession of the premises. Thereafter, Simpson brought suit for damages under § 4 of the Clayton Act for violation of §§ 1 and 2 of the Sherman Act. The district court granted Union's motion for summary judgment, the Court of Appeals affirmed, and the Supreme Court reversed.

[20] The view of Mr. Justice Douglas that the existence of a patented product constituted the *"ratio decidendi"* of *General Electric* has been severely criticized. See, e.g., *Simpson* v. *Union Oil Company of California*, 377 U.S. at 25 (dissenting opinion of Mr. Justice Stewart); *Lyons* v. *Westinghouse Electric Corporation*, 235 F. Supp. 526, 535 n. 1 (S.D. N.Y. 1964); Handler, *Seventeenth Annual Review of Antitrust Developments—1964*, 19 Record of N.Y.C.B.A. 379 (1964); Handler, *Recent Antitrust Developments—1964*, 63 Mich. L. Rev. 59, 60 (1964). Nevertheless, it seems clear that *General Electric* could be limited to its special facts and need not be overruled for the reason that all references therein to non-patented products were dicta. See note 16, supra.

that, with regard to unpatened products, no such "exception" exists.[21]

This is not to say that *Simpson* should be construed to hold all consignment agreements illegal per se under the antitrust laws. At this juncture, the best course is to view *Simpson* limited by its own particular factual context, and to proceed case-by-case where consignment systems resulting in vertical price control are involved.[22] This being so, it is well to acknowledge the fact that the Court in *Simpson*, after disposing of *General Electric*, observed that "by reason of the lease and 'consignment' agreement dealers are coercively laced into an arrangement under which their supplier is able to impose noncompetitive prices on thousands of persons whose prices otherwise might be competitive,"[23] and held, in reliance on *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960), that "resale price maintenance through the present, coercive type of 'consignment' agreement is illegal under the antitrust laws. . . ." 377 U.S. at 24.

In this case, the Commission did not make a finding of the type of coercion evident in *Simpson*. It is clear that the hearing examiner did find a form of "economic coercion", but the Commission did not appear to rely upon

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[21] "Whether . . . *(Simpson)* . . . amounts to overruling *General Electric* or merely limiting it is a matter of semantics. The practical effect is the same, whichever word one uses. I cannot escape the conclusion that where no controlling patents are present, the rule laid down in *General Electric*, at least for the future, is no longer law." *Lyons* v. *Westinghouse Electric Corporation*, 235 F. Supp. 526, 535 (S.D. N.Y. 1964).

[22] See *C.B.S. Business Equipment Corp.* v. *Underwood Corporation*, 240 F. Supp. 413, 425 (S.D. N.Y. 1964), for a similar application of Simpson.

[23] 377 U.S. at 21.

it in any way.[24] Nor did the Commission find that form of coercion found in *Atlantic Refining Co.* v. *Federal Trade Commission,* 344 F.2d 599 (6th Cir. 1965), wherein the gasoline dealer was offered the "Hobson's Choice" of "economic disaster or the consignment agreement."[25] 344 F.2d at 607. Therefore, at least for the present, we cannot hold the facts presented by this record controlled by *Simpson.* This is so for the reason that, even though we might believe existed in this case the type of coercion that *Atlantic Refining* brought within the purview of *Simpson*—as did the hearing examiner, "we recognize that it is the Commission which has the ultimate responsibility of finding the facts and that it is the findings of the Commission that we are authorized to review." *Folds* v. *Federal Trade Commission,* 187 F.2d 658, 660 (7th Cir. 1951); *Bond Crown & Cork Co.* v. *Federal Trade Commission,* 176 F.2d 974 (4th Cir. 1949). However, this is not to say that *Simpson* is not at all apposite to the instant situation, for it is. Just as *Simpson* is not to be read to hold all consignment plans illegal per se, by limiting that case to its facts does not mean that all consignment plans not coercively induced are legal per se. Our understanding of *Simpson* compels us to scrutinize closely this and all other forms of consignment marketing in this industry and others.

Thus, in sustaining the order of the Commission against respondent, Sun Oil Company, we hold, in principal reliance

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[24] With regard to coercion, the Commission merely found that "a combination or conspiracy was instituted even though dealers were not uniformly desirous of entering into the arrangement proposed by the respondent." The word "coercion" is not even present in the Commission's opinion.

[25] This is particularly striking in view of the findings of the hearing examiner. Supra, text at note 9 and text preceding note 11. It is also noteworthy that the Commission's opinion in *Atlantic Refining* was handed down on May 16, 1963, just a day after it handed down its opinion in this case.

upon *United States* v. *Masonite Corporation, supra,* and *Simpson* v. *Union Oil Company of California, supra,* that where a commission consignment plan such as this, otherwise valid as measured by the law of agency, and even though not coercively induced, results in horizontal as well as vertical price control, such consignment plan constitutes an illegal price fixing device and an unfair method of competition and unfair practice in violation of the Federal Trade Commission Act. Such a commission consignment plan as we have here we find to be illegal per se, for its evil—like the plan condemned in *Simpson*—"is its inexorable potentiality for and even certainly in destroying competition in retail sales of gasoline by . . . 'consignees' who are in reality small struggling competitors seeking retail gas customers." 377 U.S. at 21.

In so holding, we are not deterred by respondent's contention that finding an antitrust violation on these facts would render nugatory for commercial purposes the "ancient, lawful, broadly-used business practice" of consignment selling. Here, respondent seems to be of the position that a valid agency and an antitrust violation are mutually exclusive, and that the former constitutes an absolute defense to a charge of the latter. In view of the policy considerations at stake, we do not approve of such rationale, and, in accordance with the Commission, find both to have existed. "The interests of the Government . . . frequently override agreements that private parties make. Here we have an antitrust policy expressed in Acts of Congress. Accordingly, a consignment, no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy." 377 U.S. at 18.

Nor are we deterred by the contention of respondent that the Commission lacked jurisdiction in this matter because the gasoline retailed to the consuming public pursuant to the commission consignment agreements did not constitute sales "in commerce" within the meaning of

§ 5 of the Federal Trade Commission Act. On the contrary, the Commission found that in the course and conduct of its interstate business, Sun transports its gasoline in tank cars, tankers and trucks from its different refineries, terminals, and distribution points, located in various states, to retail dealers in the Norfolk area. It held that the agreement or combination between Sun and its dealers fixing the retail prices was engaged in the course of such business and, therefore, in interstate commerce. We agree.

Sun urges the case of *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U.S. 349 (1941), as decisive here in its favor. We find it to be clearly distinguishable. In that case, quite contrary to this, the unfair methods of competition sought to be regulated by the Commission were admittedly confined to activities wholly within the State of Illinois relating to goods manufactured in Illinois and which had been at no time in interstate commerce. Cf. *Holland Furnace Company* v. *Federal Trade Commission*, 269 F.2d 203, 209-213 (7th Cir. 1959), cert. den. 361 U.S. 932 (1960). In this case, Sun shipped its gasoline products to its Norfolk area dealers from points outside the State of Virginia. Such interstate character of the distribution process did not cease merely because the gasoline in question may have come to a temporary rest in storage tanks in the Norfolk area. *Standard Oil Company* v. *Federal Trade Commission*, 340 U.S. 231, 238 (1951).

Furthermore, Sun's attempt to confine the scope of this consignment plan to the 25 dealers in the Norfolk area misconceives the nature and purpose of Commission proceedings. The Federal Trade Commission Act empowers the Commission to prohibit any practice "which (has) restrained competition or might lead to such restraint if not stopped in its incipent stages." *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 693 (1948); *Federal Trade Commission* v. *Raladam*, 316 U.S. 149,

152 (1942). The record in this case would indicate that Sun's consignment plan was adopted in its Norfolk District pursuant to general directives used to combat price wars wherever they might occur. Thus, the fact that, when used, this price fixing mechanism affected only local retail sales of gasoline surely cannot be controlling. Retail sales, like price wars, are most always "local"—they were here and they were in Union Oil's "vast distribution system." 377 U.S. at 21. There is no doubt but that this consignment plan involved goods engaged in interstate commerce and was effected by a company policy conceived with a view to application wherever price distrubances affected its operations.

The order and opinion of the Federal Trade Commission is affirmed. An order for enforcement may be presented.

A true Copy: AFFIRMED.

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14,503

SUN OIL COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Final Decree Enforcing Order to Cease and Desist

Sun Oil Company, a corporation, petitioner herein, having filed in this Court on January 29, 1964, a petition to review and set aside an order to cease and desist issued

against it on November 22, 1963, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled, "In the Matter of Sun Oil Company, a corporation, FTC Docket Number 6934"; and a copy of said petition having been served upon respondent; and the respondent having thereafter certified and filed in this Court a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on June 3, 1965, and this Court having rendered its decision and judgment on August 19, 1965, affirming the Commission's order and directing that the order cease and desist be enforced;

IT IS ORDERED, ADJUDGED AND DECREED that petitioner be, and it hereby is, ordered to obey and comply with the cease and desist order entered by the Federal Trade Commission on November 22, 1963.

By the Court.

ELMER J. SCHNACKENBERG
Elmer J. Schnackenberg,
Circuit Judge.

ROGER J. KILEY
Roger J. Kiley,
Circuit Judge.

ROBERT A. GRANT
Robert A. Grant,
District Judge.

Entered: September 14, 1965.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Thursday, August 19, 1965

Before: Hon. ELMER J. SCHACKENBERG, *Circuit Judge;* Hon ROGER J. KILEY, *Circuit Judge;* Hon. ROBERT A. GRANT, *District Judge.*

No. 14503

SUN OIL COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Petition for Review of an Order of the Federal Trade Commission.

This cause came on to be heard on the petition for review of an order of the Federal Trade Commission and the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the order entered in this cause by the Federal Trade Commission on November 22, 1963, be, and the same is hereby AFFIRMED, in accordance with the opinion of this Court filed this day; and upon presentation, an appropriate decree will be entered.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 749

SUN OIL COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–24a) [1] is reported at 350 F. 2d 624. The opinion of the Federal Trade Commission (J. App. 66–77) [1] is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. 26a) was entered on August 19, 1965, and its final decree (Pet. 24a–25a) on September 14, 1965. The petition for certiorari was filed on November 17, 1965. The

[1] "J. App." refers to the joint appendix certified by the court of appeals.

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jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission's finding that the consignment plan entered into by Sun and its dealers in the Norfolk, Virginia, area constituted an unlawful vertical and horizontal price-fixing agreement was supported by substantial evidence and in accordance with the applicable decisions of this Court.

2. Whether the Commission's issuance of a cease and desist order here raises the question whether this Court's decision in *Simpson* v. *Union Oil Co.*, 377 U.S. 13, is to be applied retroactively.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, provides in pertinent part:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT

Petitioner, Sun Oil Company, is an integrated producer, refiner, and marketer of petroleum products (Pet. 4a). In 1946, it commenced marketing in the Norfolk, Virginia area, distributing its products under the Sun brand name through Taylor Oil Company, a wholesale distributor (Pet. 5a). Taylor sold to independent stations which resold at private-brand prices, generally two cents below the major-brand stations (J. App. 41–42, 68). In 1954, Sun ceased to distribute through Taylor, but instead opened company-

operated stations and also leased stations to independent dealers (Pet. 6a). At the same time, it made efforts to raise the retail price of its gasoline to the major-brand level, but because Taylor had previously sold at private-brand prices the public did not consider Sun a major brand (J. App. 41–42, 68), and Sun's share of the market fell (*ibid.*, Pet. 6a).

During late October and early November 1956, a price war broke out, limited, however, to a few blocks of one of the streets in Norfolk (Pet. 8a). On November 5, 1956, Sun summoned its dealers to meetings to discuss the price war, as well as the general marketing situation (Pet. 8a–9a; J. App. 43–44). Viewing this as an opportunity to try to increase the company's share of the market (J. App. 51–52, 73), Sun officials told the dealers that Sun prices had to be lowered to meet those posted by major stations during the price war, and might have to be lowered to within one cent of the private brands and kept at that level, and that the vehicle for accomplishing this purpose was a consignment plan under which the company would establish the retail price for the gasoline and pay the dealers a "commission" (Pet. 8a–10a; J. App. 68–72). Following a discussion of the proposal by the dealers, all save one agreed to accept consignment, and eventually the lone holdout also accepted (Pet. 10a; J. App. 72). As found by the Commission, "Sun then acted as a necessary conduit and clearing house through which the dealers among themselves and in each other's physical presence could and did pledge to fix prices horizontally; Sun, in the presence of the dealers, pledged

to fix prices vertically" (J. App. 73). One result of the adoption of the consignment plan was to spread the very limited price war throughout the Norfolk area (Pet. 8a, n. 10; J. App. 46).

The Commission, in an opinion (J. App. 66–77) which preceded this Court's decision in *Simpson* v. *Union Oil Co.*, 377 U.S. 13, found that Sun's consignment plan was a device for effecting both a vertical conspiracy between Sun and its dealers, and a horizontal price-fixing conspiracy among the dealers. It held that the horizontal aspects of the case distinguished it from *United States* v. *General Electric Co.*, 272 U.S. 476. Here, the "meetings organized by respondent provided the focal point for the dealers to gather and enter into at least a tacit or implied agreement with other participants as to the fixing of retail gasoline prices" (J. App. 74). It further found that the mere fact that not all of the dealers desired to adopt consignment did not negate conspiracy. The Commission noted that, as in *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, it was enough that the dealers accepted the invitation to participate in a plan whose known purpose and effect were to restrain trade. Finally, the Commission ruled in accordance with *United States* v. *Masonite Corp.*, 316 U.S. 265, that the price-fixing conspiracy was not privileged merely because effected through an agency arrangement.

The court of appeals affirmed in an opinion rendered after this Court's decision in *Simpson* v. *Union Oil Co., supra* (Pet. 1a–24a). It agreed with the Com-

mission that the horizontal aspects of the case distinguished it from *General Electric*, and that *Masonite* was controlling. The court deemed its position strengthened by this Court's decision in *Simpson*, even though neither it nor the Commission relied on the examiner's finding that Sun had coerced its dealers. (Pet. 18a–22a.) It expressed the view that the consignment plan in this case would be illegal under *Simpson* because "its evil—like the plan condemned in *Simpson*—is its inexorable potentiality for and even certainty in destroying competition in retail sales of gasoline by * * * 'consignees' who are in reality small struggling competitors seeking retail gas customers, 377 U.S. at 21" (Pet. 22a).

ARGUMENT

The decision below is clearly correct and the petition for certiorari presents no question warranting plenary consideration by this Court.

1. The Commission applied well settled principles to undisputed facts in finding that Sun engaged in an unlawful price-fixing conspiracy and its finding was, as the court of appeals held (Pet. 13a), supported by substantial evidence. Analyzing the evidence with respect to market conditions (J. App. 66–68), the dealer meetings with Sun, and the testimony as to what was said and done there (J. App. 68–72), the Commission concluded that Sun "acted as a necessary conduit and clearing house through which the dealers among themselves and in each other's physical presence could and did pledge to fix prices horizontally;

Sun, in the presence of the dealers, pledged to fix prices vertically" (J. App. 73); "Sun and its dealers wished and agreed to hold steadfastly to a uniform price line" (*ibid.*); they entered "horizontal arrangements which wiped out any slight opportunity for independent market action through price variances of any of its retail dealers" (*ibid.*); in short, the consignment arrangement was "a fiction and a subterfuge" (J. App. 75).

Since, in the circumstances, Sun did not employ consignment as a *bona fide* marketing method, but simply as a "means or method for effecting the price fixing scheme" arranged at the meetings between Sun and the dealers (J. App. 75), this Court's decision in *United States* v. *General Electric Co.*, 272 U.S. 476, is inapplicable; as stated in *United States* v. *Masonite Corp.*, 316 U.S. 265, the agency form may not be used by competitors as a price-fixing device. Moreover, the *Simpson* decision makes clear that a price-fixing scheme is not saved by adopting the consignment form of distribution. Petitioner argues that *Masonite* is distinguishable because the "consignees" in that case were manufacturers of products sold in competition with *Masonite* (Pet. 17). But such a narrow construction of *Masonite* is warranted neither by its facts nor by this Court's opinion. The facts in *Masonite* were that with respect to the patented hardboard (which was the product whose price was fixed), the "agents" were distributors, not manufacturers; and the decisive consideration in *Masonite* was that

the competing distributors, like the competing dealers here, "knowing that concerted action was contemplated and invited * * * gave their adherence to the scheme and participated in it" within the rule of *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 226. (See 316 U.S. 265, 275.) Both here and in *Masonite,* the horizontal price-fixing agreement among competing sellers made the agency arrangement unlawful despite the doctrine of the *General Electric* case.

In short, the decision below is clearly correct even assuming that *General Electric*—notwithstanding *Simpson*—retains validity with respect to consignment selling of non-patented products.

2. The question posed by petitioner as to whether the *Simpson* doctrine should be given retroactive application is not present in this case. The Federal Trade Commission's cease and desist order operates only prospectively; it does not involve any award of damages for past misconduct—the only situation in which this Court suggested, in *Simpson* (377 U.S. at 24–25), that a question of the fairness of retroactive application might arise. *Atlantic Refining Company* v. *Federal Trade Commission,* 344 F. 2d 599 (C.A. 6), certiorari denied, No. 558, Dec. 6, 1965. Moreover, as shown above, petitioner's conduct was clearly unlawful even under the law as it stood prior to *Simpson.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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